Nos. 88-449, 88-513

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN F. HEALY, *et al.*,
Appellants,

v.

THE BEER INSTITUTE, *et al.*,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,

v.

THE BEER INSTITUTE, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The Distilled Spirits Council of the United States, Inc. ("DISCUS"), a Delaware non-profit corporation, is the principal trade association of the producers and im-

porters of distilled spirits products in the United States. The members of DISCUS produce or import approximately 85% of the distilled spirits products sold in the United States. DISCUS members include both national and regional suppliers, and the members ship distilled spirits to customers throughout the country. The particular Connecticut price affirmation statute whose constitutionality is at issue in this case does not cover distilled spirits, but distilled spirits are subject to affirmation statutes in Connecticut and other states. The legal principles established by the Court's decision in this case will bear upon the constitutionality of those statutes. The affirmation statutes interfere with interstate commerce in distilled spirits products, and the members of DISCUS have a vital interest in removing the burdens on interstate commerce that those statutes impose.[1]

SUMMARY OF ARGUMENT

The beer price affirmation provisions of the Connecticut Liquor Control Act require brewers and importers of beer (a) to post on the sixth of each month the per-unit prices they will charge Connecticut wholesalers in the following month, and (b) to certify in writing that these prices are no higher than the lowest prices they are charging on posting day anywhere in the bordering states of Massachusetts, New York, and Rhode Island.[2] This scheme violates the Commerce Clause for two reasons: first, its intended effect is to raise beer prices in the bordering states in order to offset competitive advantages enjoyed by those states; second, the scheme could not be

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[1] Written consent to the filing of this brief amicus curiae has been obtained from the parties to this case. Copies of the consent letters accompany this brief.

[2] CONN. GEN. STAT. ANN. § 30-63b(b) (West Supp. 1988). We construe the statute in accordance with the Declaratory Ruling of the Connecticut Department of Liquor Control purporting to eliminate the express prohibition on reducing out-of-state prices after posting in Connecticut.

copied by other states without imposing palpably intolerable burdens on commerce. The scheme is not saved by the Twenty-first Amendment; to the contrary, the scheme deeply offends the fundamental principle that each state should have substantial autonomy in internally regulating the sale, transportation, and distribution of alcoholic beverages.

1. The Court held long ago that no state may "project its legislation into [other states] by regulating the price to be paid" for goods in those states.[3] More recently, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the Court held that this rule directly barred a state liquor price affirmation statute that on its face only capped prices in the enacting state, but whose "'practical effect' . . . is to control liquor prices in other States."[4] The Connecticut scheme is not distinguishable in any relevant respect from the New York statute invalidated in *Brown-Forman*.

Connecticut concedes that the scheme was adopted because "the retail price of beer has generally been higher in Connecticut than in the bordering states."[5] Connecticut has consistently claimed that its purpose was simply "to lower the price of beer in Connecticut,"[6] but the statutory lever plainly works both ways. An earlier version of the Connecticut scheme, differing only in that the supplier was required to certify that its posted prices did not exceed border state prices in the covered month (rather than on posting day), was invalidated in *United States Brewers Association v. Healy* ("*Healy I*"), because "the obvious effect . . . is to control the minimum price that may be charged [in bordering-state transactions]."[7]

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[3] *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

[4] 476 U.S. 573, 583 (1986).

[5] Conn. J.S. 7.

[6] *Id.* at 8.

[7] 692 F.2d 275, 282 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

The present scheme has the same "obvious effect." For example, a Massachusetts statute requires beer prices in that state to be posted and maintained for a calendar month.[8] Therefore, the prices a supplier wishes to charge in Connecticut in February must be charged in Massachusetts throughout January, the prices he wishes to charge in Connecticut in March must be charged in Massachusetts throughout February, and so forth. It is the Connecticut statute, not the purely in-state Massachusetts requirement for beer, that links prices in the two states. Connecticut seeks to distinguish its present scheme from the Connecticut scheme condemned in *Healy I* and the similar New York scheme condemned in *Brown-Forman* on the ground that the required linkage between Massachusetts and Connecticut prices is not simultaneous. But what *Healy I* and *Brown-Forman* condemned was not *identity* of prices in different states on a given day but the fact that one state's rules continuously dictated permissible price levels elsewhere; that vice is equally present here.

2. Instead of prescribing in-state regulation, the Connecticut statute dictates the *relationship* between beer prices in Connecticut and past beer prices in bordering states. When one state seeks to legislate the relationship between transactions in two or more states, a new question naturally arises: what would happen if the legislatures of other states copied the first?[9] If the answer is

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[8] MASS. ANN. LAWS ch. 138, § 25B(d) (Law. Co-op. 1981). Massachusetts has a further statute applicable to alcoholic beverages other than malt beverages that requires suppliers to affirm that their price to Massachusetts wholesalers "is not higher than the lowest price at which such item of alcoholic beverage will be sold by such brand owner . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month for which [the posted price] shall be in effect . . . ." MASS. ANN. LAWS ch. 138, § 25D(a) (Law. Co-op. 1981).

[9] The Court has in the past asked this kind of question to test state statutes that prescribe or affect interstate relationships. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S.

that such replication would produce a plainly intolerable obstruction of commerce, all such state statutes, including the first, are invalid. And where there is every reason to believe that other states would in fact quickly copy the first, invalidation must be swift.

The Connecticut scheme violates this rule. If even one bordering state adopted the Connecticut scheme, there would be a two-state gridlock: prices charged by multistate beer suppliers in each state would be capped by past prices in the other, creating a permanent ceiling that would also be a permanent floor because any reduction would forever lower the ceiling. Adoption of the Connecticut scheme by a few additional states would spread the gridlock nationwide, trapping not only all multistate suppliers but also every state bordering any Connecticut-scheme state: such a bordering state could not choose to leave beer prices to market forces, because prices in that state would be driven to the levels established in the Connecticut-scheme states. The spread of the Connecticut scheme forces uniform pricing throughout the nation and upon individual states that wish to determine their own regulatory goals.

3. The Twenty-first Amendment does not save, but condemns the Connecticut statute. The Court squarely

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617, 629 (1978); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773 (1945); *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927), *overruled on other grounds, Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 572 (1886). In the context of state taxation of interstate commerce, the Court has referred to the rule as one of "internal consistency." *See, e.g., Goldberg v. Sweet*, 57 U.S.L.W. 4070, 4072 (U.S. Jan. 10, 1989) ("To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result."); *American Trucking Ass'ns v. Scheiner*, 107 S. Ct. 2829, 2840 (1987); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

held in *Brown-Forman* that, while "[t]hat Amendment gives the States wide latitude to regulate the importation and distribution of liquor within their territories," [10] it "confers no authority to control sales [of liquor] in other States. The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption [elsewhere]." [11] Moreover, the Connecticut statute, like the statute condemned in *Brown-Forman*, "may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment . . . [by forcing] other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in [the enacting state]." [12]

ARGUMENT

I. THE CONNECTICUT SCHEME VIOLATES THE COMMERCE CLAUSE BECAUSE OF ITS INTENDED EFFECT ON BEER PRICES IN OTHER STATES.

A. The Connecticut Scheme Is Intended To Raise Beer Prices in the Bordering States in Order To Offset Competitive Advantages Enjoyed by Those States.

The Connecticut statute requires each beer supplier to post on the sixth of each month the per-unit prices it will charge to wholesalers in the state in the following month, and then to adhere to the posted prices.[13] The statute also requires the supplier to certify under oath that its posted prices are no higher than the lowest prices at which it is then (on posting day) selling in the

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[10] 476 U.S. at 584.

[11] *Id.* at 585.

[12] *Id.*

[13] CONN. GEN. STAT. ANN. § 30-63c(b) (West Supp. 1988); 17 CONN. AGENCIES REGS., LIQUOR CONT. § 30-6-B4(a) (1985).

bordering states of Massachusetts, New York, and Rhode Island.[14]

The conceded purpose of this scheme is to equalize the typically higher prices in Connecticut and the lower prices in the bordering states. Connecticut has acknowledged in this Court that, "[h]istorically, the retail price of beer has been generally higher in Connecticut than in the bordering states . . . ." [15] Connecticut contends that the "purpose of the law was [merely] to lower the price of beer in Connecticut" [16] and not to raise prices elsewhere, but the statutory lever plainly works both ways, raising prices in the bordering states.[17]

Indeed, an earlier version of the Connecticut scheme was invalidated under the Commerce Clause for just this reason. In 1981, Connecticut adopted a statute much like the present one, except that the brewer was required to certify that its posted prices were no higher than the

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[14] CONN. GEN. STAT. ANN. § 30-63b(b) (West Supp. 1988).

[15] Conn. J.S. 7.

[16] *Id.* at 8.

[17] In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966) ("*Seagram*"), on a facial challenge to a novel affirmation statute before it had gone into effect, the Court said that the "discriminatory effects" alleged in that case were then "largely matters of conjecture." Whatever the continuing validity of the decision in that case, *see Brown-Forman*, 476 U.S. at 584 n.6; *id.* at 586 (Blackmun, J., concurring), the fact that the Connecticut scheme *must* raise prices in the bordering states is not a matter of speculation. It follows directly from Connecticut's concession that the typical prices in Connecticut tend to be higher than in the bordering states, together with the assumption that a beer supplier will seek to maximize its profits. Such a supplier, forced to a single set of prices, will set them based on aggregate demand in an area that includes the bordering states *and* Connecticut, and they necessarily will be higher than prices based on demand in each bordering state alone. The point is well explained in Pustay & Zardkoohi, *An Economic Analysis of Liquor Price Affirmation Laws: Do They Burden Interstate Commerce?*, 48 LA. L. REV. 649 (1988).

lowest prices at which it *would* sell in bordering states during the month the posted prices were in effect in Connecticut. The 1981 version of the scheme was challenged in *United States Brewers Association v. Healy* (*"Healy I"*),[18] and struck down by the court of appeals on the ground that it was "evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well," and "plain" that the statute had an "extraterritorial thrust."[19] This Court summarily affirmed.[20]

Connecticut claims to have remedied this defect, but the extraterritorial thrust of the revised version is as plain and just as unconstitutional. The present Connecticut statute differs from the former version in only two respects: (a) there is only one day, rather than a month, during which the beer supplier is formally required to raise or hold prices in the bordering states up to the level it wishes to charge in Connecticut; and (b) the one-day period comes ahead of, rather than simultaneously with, the period during which the posted prices must be adhered to in Connecticut. Neither of these relieves the scheme of its "extraterritorial thrust."

First, Connecticut counts, as the court below noted, on the statutes in Massachusetts and New York to broaden the impact of the Connecticut scheme. Massachusetts requires beer suppliers to post prices in advance and keep them in effect throughout a calendar month.[21] New York provides that any price that has been decreased may not then be increased for 180 days.[22] To use the Massachusetts statute as an example, the

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[18] 692 F.2d 275 (2d Cir. 1982).

[19] *Id.* at 282.

[20] *Healy v. United States Brewers Ass'n*, 464 U.S. 909 (1983).

[21] *See* MASS. ANN. LAWS ch. 138, § 25B(d) (Law. Co-op. 1981).

[22] N.Y. ALCO. BEV. CONT. LAW § 55-b2 (McKinney 1987).

combined effect of the Connecticut statute and the Massachusetts statute is that the prices a beer supplier wishes to charge in Connecticut in February must be charged in Massachusetts throughout January; the March Connecticut prices must be charged in Massachusetts throughout February, and so forth.[23]

Connecticut argues that the direct effect of its scheme is only to raise prices in bordering states on one day, and that any broader effect in bordering states is the fault of the statutes adopted in those states, for which Connecticut is not to blame.[24] But the Massachusetts and New York statutes relating to beer deal only with prices within those states. It is Connecticut alone that forges the links between states. The citizens and the legislatures in Massachusetts and New York have not chosen the higher beer prices Connecticut is imposing on them.

Second, it is immaterial to the "extraterritorial thrust" that the link Connecticut has forged is between month 1 in Massachusetts and month 2 in Connecticut. The scheme condemned in *Healy I* was unconstitutional *not* because beer prices would always be identical in Connecticut and the bordering states, but because compliance with Connecticut's rules would continuously drive suppliers to charge higher prices in the bordering states than they would otherwise choose. That is equally the case under the revised scheme: beer suppliers obviously do not set Massachusetts prices without looking ahead to Connecticut's requirements. While it is possible in any given month for a supplier to have lower prices in Massachusetts than in Connecticut, Connecticut penalizes

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[23] Connecticut's assertion in this Court, *see, e.g.*, Brief of Appellants John F. Healy, *et al.* at 12, 13, 22, that the supplier is nevertheless free to reduce his *Massachusetts* prices in any given month is an attempt at sleight-of-hand: the penalty for doing so is lower Connecticut prices throughout the following month because Massachusetts requires the price to be held for one month.

[24] *See, e.g., id.* at 9, 13.

that choice by forcing a reduction in Connecticut the following month.[25]

In sum, the revised Connecticut scheme, like the old one, deters low prices and price reductions in bordering states by demanding a monetary benefit for Connecticut residents in exchange for the "privilege" of charging low prices on sales in bordering states. The plain objective of the scheme remains the reduction of competitive pressures by "control[ling] the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a state outside of Connecticut." [26]

B. A Scheme That Penalizes Low Beer Prices in Other States by Exacting a Monetary Benefit for a State's Own Residents Violates the Commerce Clause.

The Commerce Clause [27] forbids extraterritorial regulation of prices. As long ago as 1894, in invalidating an attempt by Pennsylvania to regulate payments made by a railroad in New York, the Court emphasized that "[n]o principle [was] better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction." [28] In *Baldwin v. G.A.F. Seelig, Inc.*,[29] the Court

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[25] The Connecticut statute also intentionally penalizes promotional discounts and other forms of interbrand price competition in bordering states. The Connecticut statute specifically provides that in determining prices in the bordering states "appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever." CONN. GEN. STAT. ANN. § 30-63c(b) (West Supp. 1988). By virtue of the Connecticut scheme alone, a supplier must avoid having any promotional discount (even one applicable to a few qualified purchasers or locations in the bordering state) in effect in any bordering state on the day Connecticut has chosen as posting day, on pain of the promotional price's becoming the regular price for a whole month in Connecticut.

[26] *Healy I*, 692 F.2d at 282.

[27] U.S. CONST. Art. I, § 8, cl. 2.

[28] *New York, Lake Erie & W. R.R. v. Pennsylvania*, 153 U.S. 628, 646 (1894).

[29] 294 U.S. 511 (1935).

made it clear that this principle forbids regulation of in-state transactions that is designed to control out-of-state prices. The Commerce Clause principles set forth in *Seelig* bar the present Connecticut scheme, as they barred the version adopted in 1981.

In *Seelig*, New York attempted, by barring certain transactions from taking place in New York, to dictate the minimum price at which a New York milk dealer could buy milk in Vermont from a dairy located in Vermont. Justice Cardozo, writing for a unanimous Court, recognized that the purpose of the statute was "the creation of a parity of prices between New York and other states."[30] Such a statute was impermissible because "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."[31] The Court explained that "commerce . . . is burdened unduly when one state regulates by indirection the prices to be paid to producers in another . . . ."[32]

The *Seelig* principle has been consistently applied and reaffirmed in modern cases, including cases involving alcoholic beverage price affirmation statutes. Indeed, it was the basis for the invalidation of the 1981 version of the present Connecticut scheme. In *Healy I*, the statute at issue required each brewer to "file a sworn affirmation that its posted per-unit prices will be no higher than its prices for the corresponding units sold in any state bordering Connecticut during the month covered by the

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[30] *Id.* at 524.

[31] *Id.* at 521.

[32] *Id.* at 524; *see also id.* at 528 ("In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. . . . It is a very different thing to establish . . . a scale of prices for use in other states . . . .").

posting." [33] The Second Circuit, finding it "evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well," [34] invalidated the statute, and this Court summarily affirmed.[35]

The Court again relied on *Seelig* in *Brown-Forman Distillers Corp. v. New York State Liquor Authority.*[36] In *Brown-Forman*, the Court struck down a New York statute that required liquor producers to affirm that their prices to in-state wholesalers were no higher than the lowest prices charged to wholesalers anywhere else in the country during the same month. The Court concluded that the "practical effect" of the law was "to control liquor prices in other States" [37] and declared it invalid.

The Connecticut statute at issue here is not distinguishable from the statutes invalidated in *Seelig*, *Healy I*, and *Brown-Forman*. Connecticut has conceded that beer prices would normally be lower in the bordering states than in Connecticut, and the state admits that the purpose of the scheme is to eliminate that difference, so as to protect Connecticut wholesalers from bordering state competition.[38] Connecticut does this by penalizing, in Connecticut transactions, any reduction of prices in bordering states.

The Court condemned exactly this in *Brown-Forman*:

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[33] 692 F.2d at 277 (footnote omitted).

[34] *Id.* at 282.

[35] *Healy v. United States Brewers Ass'n*, 464 U.S. 909 (1983).

[36] 476 U.S. 573, 580, 582-83 (1986).

[37] *Id.* at 583.

[38] Brief of Appellants John F. Healy, *et al.* at 6-7, 19.

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. . . . Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.[39]

The Connecticut scheme, which seeks to protect both Connecticut consumers and Connecticut vendors by forcing Connecticut prices down while forcing bordering state prices up, is the same sort of "economic protectionism."

II. THE CONNECTICUT SCHEME VIOLATES THE COMMERCE CLAUSE BECAUSE REPLICATION OF THE SCHEME IN OTHER STATES WOULD LEAD TO A PLAINLY INTOLERABLE OBSTRUCTION OF COMMERCE.

A. A State Statute That, on Its Face, Seeks To Dictate Interstate Price Relationships Should Be Tested for "Internal Consistency."

The Connecticut scheme seeks, on its face, "to regulate beer prices *in reference to* the regulated prices in the border states."[40] Its purpose is to dictate, not merely prices or price ceilings in Connecticut, but the relationship between prices in Connecticut and those in Massachusetts, New York, and Rhode Island. We assume *arguendo* that this alone "is not sufficient to invalidate the statute."[41] But the fact that Connecticut is, indisputably, not simply minding its own business but attempting to forge a link with prices in other states naturally gives

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[39] 476 U.S. at 580 (citations omitted); *see also New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (for New Hampshire "to gain an economic advantage at the expense of New England Power's customers in neighboring states" is " 'simple economic protectionism' ")).

[40] Conn. J.S. App. 9A (emphasis in the court's opinion).

[41] *Seagram*, 384 U.S. at 43.

rise to a further question: what would happen if other states copied the Connecticut statute? We suggest that if the answer is that there would then be a plainly intolerable burden on commerce (or, indeed, on the Twenty-first Amendment prerogatives of the remaining states to choose their own regulatory goals), then all such statutes, including the first, are invalid.

The Court has applied such a rule in the past, invalidating state regulations in a variety of situations after examining the consequences if other states were to imitate the first.[42] In the area of state taxation of activities in interstate commerce, the Court has articulated the rule as one of "internal consistency": "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax no multiple taxation would result." [43]

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[42] *E.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773 (1945); *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927) ("[I]f Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island."), *overruled on other grounds, Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983); *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 572 (1886) ("[I]f each one of the States through whose territories these goods are transported can fix its own rules for prices . . . and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to.").

[43] *Goldberg v. Sweet*, 57 U.S.L.W. 4070, 4072 (U.S. Jan. 10, 1989); *see American Trucking Ass'ns v. Scheiner*, 107 S. Ct. 2829, 2840 (1987); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

This is a case where copycat statutes are not a mere theoretical possibility. As we argue in more detail below, there are compelling reasons for price linkage statutes to spread and historical evidence that they will do so. The Commerce Clause and the Twenty-first Amendment together set bounds on any one state's regulation of multistate suppliers of alcoholic beverages. The Court can test whether Connecticut has overstepped those bounds by examining what would happen if other states were to copy the Connecticut scheme.

There is an obvious illustration of why such a test is needed. Suppose Connecticut modified its scheme, only slightly, to provide that in-state beer prices must be a penny a case *lower* than past prices in bordering states. Such a statute, if it stood alone, would hardly differ in its impact from the present Connecticut scheme, and Connecticut could defend it with all the arguments she makes in this case: that the scheme directly regulates only transactions occurring in Connecticut, that suppliers are free to modify their prices in bordering states, etc. But the Court would surely invalidate the scheme on "internal consistency" grounds: it could not be copied by even one other linked state because only one state could have the lowest price. As we explain below, the consequences of replication of the Connecticut scheme are as extreme.[44]

B. The Connecticut Scheme Fails the "Internal Consistency" Test.

The Connecticut scheme woefully fails the proposed test, and it does so in part because of a feature that Connecticut deems one of its virtues: the linkage between Connecticut prices and *past* prices in other states. If

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[44] We also point out below, *see* pp. 17-18 *infra*, that small differences in methods of computation between Connecticut and a bordering state that seeks to copy the Connecticut scheme would create the same sort of stymie as an explicit call in each state for lower prices than in its neighbors.

other states were to copy this linkage, the result would be rigid gridlocks, trapping both multistate suppliers and other states.

To begin with, if even one bordering state (say, New York) copied the Connecticut scheme, prices charged by multistate suppliers in both states would become virtually immoveable forever: unless a beer supplier declined to sell in one of the states for an entire month, the maximum prices in each state would be capped by previous prices in the other state. Moreover, the maximum prices would almost surely be the minimum prices as well, because any reduction in either state would permanently lower the ceiling in both. Except by staying out of one of the states, a multistate beer supplier could not lower prices to meet competition, nor could it ever raise prices to cover increased costs.

This mere two-state gridlock would also trap other states. Suppose, for example, that after New York copies Connecticut, some other state bordering either Connecticut or New York—say, Rhode Island—chose to leave beer prices unregulated (as Rhode Island has), on the assumption that market forces would produce the lowest prices for its consumers. Prices charged by multistate suppliers in Rhode Island would nevertheless never fall below (although they could be above) the linked prices in Connecticut and New York, because any lower price would permanently reduce the Connecticut-New York ceiling. The Rhode Island legislature, realizing this, would be compelled to imitate its neighbors to protect its beer sellers and its citizens from price variations that could only go one way.[45]

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[45] There is a page of history to go with this logic. In 1966, when the Court decided *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (*"Seagram"*), the New York price affirmation statute challenged in that case was a novel one, paralleled in only one other state. *See* KAN. STAT. ANN. § 41-1112 (1961). The Court rejected the challenge saying, "[i]t will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly pre-

If a larger number of states adopted the Connecticut statute, the result would approach a permanent nationwide gridlock. No beer price charged by a multistate supplier in a Connecticut-scheme state could ever be raised (because every price in every Connecticut-scheme state would be determined by reference to a past price in a different place), and no such price would ever be lowered because this would cause the nationwide ceiling to ratchet down. Prices in non-Connecticut-scheme states would be forced to be at least as high as in the Connecticut-scheme states and could be higher. Even the option of achieving a price adjustment by strategically staying out of one or a few states in one month would ultimately become impractical.

The picture gets even worse if one assumes that the states' regulatory schemes might *not* be quite identical but that, for example, the method of computing a permissible price might vary somewhat from state to state. That is, of course, a more realistic assumption: the computation of prices and the designation of the units to which they apply are both matters of some complexity, and beer price-control statutes have often varied in their definitions or have left the matter to regulatory agencies.[46] If, for example, New York required all "prices" to be determined net of certain taxes, while Connecticut required all "prices" to be determined net of certain delivery costs, the two statutes, each purporting to require

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sents them." *Seagram*, 384 U.S. at 42-43. By the time the *Brown-Forman* case reached the Court in 1986, twenty other states had decided that, if New York could demand the lowest prices in the country, so could they, and had parroted (with variations) the New York statute. *Brown-Forman*, 476 U.S. at 576. The minimum prices charged in any state had become the maximum prices chargeable in much of the nation.

[46] *See, e.g.*, N.Y. ALCO. BEV. CONT. LAW § 55-b3b (McKinney 1987).

only that in-state prices be "no higher than" bordering state prices, might in practice each require that prices in the enacting state be lower than in the other.

At the time of *Brown-Forman*, the maze of price-affirmation statutes [47] meant that, notwithstanding the local-option philosophy that underlies the Twenty-first Amendment, for any supplier of alcoholic beverages doing a multistate business, pricing was done for covered products on a national basis and was a matter of enormous complexity. Multistate replication now of the Connecticut scheme would be even worse, because prices would be linked not only from state to state but to the past as well. The consequences for both interstate commerce and state regulatory discretion are plainly intolerable, and the Connecticut scheme should be declared invalid under the Commerce Clause for that reason.

III. THE TWENTY-FIRST AMENDMENT DOES NOT SAVE THE CONNECTICUT SCHEME; IT PROVIDES A FURTHER REASON FOR CONDEMNING IT.

A. *Brown-Forman* Establishes That the Twenty-first Amendment Does Not Give Any State the Right To Impose Its Policies on Its Neighbors.

The Twenty-first Amendment prohibits the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof. . . ." [48] The Court has consistently recognized the authority this gives the states to regulate imports and internal traffic in alcohol: "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants

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[47] *See* n.45 *supra*.

[48] U.S. CONST. Amend. XXI, § 2.

destined for use, distribution, or consumption within its borders." [49]

But when the Twenty-first Amendment was invoked in defense of the price affirmation statute involved in *Brown-Forman*, as it is here, the Court gave that contention short shrift:

> [The Twenty-first Amendment] gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. The Commerce Clause operates with *full force* whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country, or another State.[50]

Indeed, the Court has regularly rejected the argument that the Twenty-first Amendment entitles a state to reach conduct beyond its borders.[51]

B. The Connecticut Scheme Is Fundamentally Inconsistent With the Twenty-first Amendment, Because It Intrudes Upon *Other* States' Prerogatives To Set Alcoholic Beverage Policies.

The Chief Justice recently observed, in another context, that "the bounds of [the Twenty-first Amendment] have escaped precise definition." [52] One thing surely beyond dispute, however, is that a principal purpose of the

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[49] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).

[50] *Brown-Forman*, 476 U.S. at 585 (emphasis added; citation omitted).

[51] *See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333-34 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715-16 (1984).

[52] *South Dakota v. Dole*, 107 S. Ct. 2793, 2795 (1987).

Amendment was to protect states from interference by other states in their internal liquor policies. The Connecticut scheme is exactly such interference.

The history of the Amendment is familiar. Section 2 of the Twenty-first Amendment incorporated into the Constitution the substance of two pre-Prohibition statutes: the Wilson Act of 1890 [53] and the Webb-Kenyon Act of 1913.[54] Both were intended in part to prevent the rules and practices in some states from being imposed on other states.[55] Supporters of the Webb-Kenyon Act—whose language formed the prototype for Section 2 of the Twenty-first Amendment [56]—emphasized that its purpose was to provide each state with the power to regulate within its own borders, but not to regulate in other states. As Representative Henry stated to the applause of the House: "Today we appeal to you to maintain the integrity of State laws, State governments, and the right of legal self-government, *to let the people of every State control the liquor traffic as they see proper.*" [57]

The Court has long recognized that the Twenty-first Amendment protects states against, *inter alia*, each

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[53] 27 U.S.C. § 121 (1982).

[54] 27 U.S.C. § 122 (1982).

[55] The Wilson Act made liquor subject to the laws of each state "upon arrival" in that state. The Webb-Kenyon Act prohibited the importation of liquor intended for use in violation of the laws of the receiving state.

[56] "The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig v. Boren*, 429 U.S. 190, 205-06 (1976); *see* 76 CONG. REC. 4141 (1933) (remarks of Sen. Blaine); *id.* at 4227-28 (remarks of Sen. Bingham).

[57] 49 CONG. REC. 2787 (1913) (remarks of Rep. Henry) (emphasis in original). Of course, as the Court has recognized, the power of a state to regulate internally is not absolute. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980); *Craig v. Boren*, 429 U.S. 190, 204-09 (1976); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (per curiam).

other. In *Carter v. Virginia*,[58] the Court examined a Virginia law intended to prevent diversion of alcoholic beverage shipments, supposedly moving through that state, into illicit channels in Virginia.[59] The Court upheld the law because "[b]y [Virginia's] ruling she has imposed no substantial clog on whatever cognate rights her sister states may have to determine their own policies regarding intoxicating liquors and to receive alcoholic beverages in interstate commerce, if they so desire." [60] Justice Frankfurter noted in concurrence: "State control must yield to superior federal power, but State control by one State, since the Twenty-first Amendment, need not yield to State control by another State." [61]

Similarly, in *Brown-Forman*, after ruling that the extraterritorial effects of New York's price affirmation law "dispose[d] of the Twenty-first Amendment issue," [62] the Court provided a further reason for ruling against the state:

> New York's affirmation law may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment. . . . [New York law], therefore, may force other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in New York. New York's reliance on the Twenty-first Amendment is therefore misplaced.[63]

There is, in sum, considerable irony in Connecticut's invocation of the Twenty-first Amendment in this case.

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[58] 321 U.S. 131 (1944).

[59] *Id.* at 135.

[60] *Id.* at 138.

[61] *Id.* at 141.

[62] *Brown-Forman*, 476 U.S. at 585.

[63] *Id.*

The Connecticut scheme forces prices higher in neighboring states, penalizes the beer-price policies of Massachusetts and New York, defeats the objective of Rhode Island to allow beer prices to be determined by market forces, and threatens (if the Connecticut scheme is copied elsewhere) to create a national gridlock in which *no* state has effective power to regulate prices within its borders and price policy is uniform nationwide. That, to say the least, is not what the draftsmen of the Twenty-first Amendment intended.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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